
CHAPTER 2

Globalization of Construction

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I. International Construction: An Overview

Globalization of the construction industry is a reality. In no other century have so many construction firms from all over the world and with such a variety of expertise ventured beyond their own national borders to perform work abroad.

The concept of “international construction” does not lend itself to a simple definition. It can be understood in many different ways and can be used to describe a host of contracting structures. Perhaps the only common denominator is that in all international construction projects there are parties who are either foreign to the jurisdiction where the project is located or have contracted across national borders for the supply of goods or services related to the project.

International construction projects can vary from the very simple, such as the construction of a small office building by a foreign firm, to the highly complex, such as a strategic energy project in Central America. For example, for a Central American project, several countries in that region might form a commercial corporation under the laws of Panama and then enter into a construction contract with a consortium of two contractors (one from Italy and the other from Spain) to construct energy transmission lines across six countries, applying the laws of Panama to contract interpretation issues, the laws of each of the countries where work is to be performed to issues relating to contract performance, and the UNCITRAL Arbitration rules to the resolution of any dispute that might arise.

While there is no single or universally accepted definition of international construction, it can be understood to include any of the following:

1. A construction project to be carried out in two or more countries
2. A construction project contracted and delivered through an international procurement or an international contracting procedure

3. A construction project to be carried out in one country by a foreign construction company
4. A construction project to be carried out in one country by a national construction company in accordance with international technical and/or legal standards, rules, and laws
5. A construction project involving the supply of goods, services, or equipment by foreign companies

II. The International Construction Boom

International construction is by no means new. Many construction companies throughout the world have a history of performing projects both in their home countries and abroad. Clear examples of such projects are the Panama Canal and the Suez Canal, which were both constructed by foreign contractors.

The growth in international construction seen in recent years is the result of many political, economic, legal, technical, financial, and even social factors. These forces have spurred development of increasingly complex construction projects that can only be carried out by companies with international knowledge, ability, and commitment.

From a political point of view, the fall of socialism and the consequent new trends of liberalization and deregulation that began in the 1980s led to a relaxation of the formerly protective policies of many countries. These countries previously had a closed system based principally on their own internal national economic activity, independent or isolated from the rest of the world.

Economic and legal changes, such as the implementation of increasingly clear and open international commerce rules, have opened previously closed markets and accelerated the participation of international construction firms in countries that were previously inaccessible. The modification of foreign investment rules to encourage participation of foreign industries in those countries' economies, as well as the economic integration and the signing of trade agreements that have interconnected economies and industries in an unprecedented way, opened the door for construction firms to take advantage of the resulting increased opportunities abroad.¹ Many countries also decisively modified their contract laws both to provide clearer rights and obligations and to signify acceptance of alternative dispute resolution systems in lieu of local litigation, making international construction a less risky endeavor for companies that were concerned about resolving potential disputes in a foreign court system.

1. For example, the North American Free Trade Agreement (NAFTA) contains several new rules to enable Canadian, American, and Mexican construction firms to participate in and execute projects throughout the entire region.

Another factor in this evolution was the need of construction firms (primarily those from first world countries where infrastructure was already well developed) to identify new opportunities to perform work and projects less in demand in their home countries. While more developed countries generally have essential infrastructure in place, many countries with emerging economies—the so-called “third world countries” or “developing countries”—typically are in much greater need of those infrastructure projects necessary to meet even the most basic needs of their citizens. These infrastructure needs include water treatment plants, power plants, pipelines, transmission lines, hospitals, railroads, highways, and other projects necessary to achieve a higher standard of living. These types of projects provide excellent opportunities for the “big players” in the construction industry with relevant experience to maintain and fully utilize specialized teams equipped to efficiently perform this work.

Emerging countries often lack the financial resources required to support needed infrastructure projects. As a result, these countries must request funds from export credit agencies and other international financial resources. The organizations providing such financing often require the participation of reputable, knowledgeable, and experienced international contractors, as well as a certain amount of “foreign content” sources (for services or goods), or sources from the financing organization’s country.

Another factor that has influenced the growth in international construction has been the development of advanced technology for oil, gas, and other energy projects. In many instances, this technology constitutes intellectual property owned by international firms, who also carry out construction. Consequently, if a country wanted or needed to acquire or use the technology, it would necessarily seek out or solicit the participation of the owner of that technology when proceeding with the project.

Finally, the development of means, sources, and tools needed to develop entrepreneurial, industrial, and commercial activities abroad, such as transportation networks, telecommunications and Internet technology, and other sectors and industries such as banking and finance, has fueled the growth of the international construction market.

Not all construction firms are capable of performing in the international marketplace. International players specializing in energy, oil, and gas projects have found real opportunities and have been very successful in performing construction projects that call for highly specialized technology or services, while building and civil engineering companies, by contrast, enjoy fewer opportunities in the international marketplace. Typically, local companies are more capable of developing these areas of expertise as a natural result of the fact that more basic technology and procedures are involved. International contractors often are selected for larger or more complex projects, especially when their unique experience, capabilities, knowledge, and technology are needed. The international construction boom has resulted accordingly from need and evolution, not from coincidence or *capriccio*.

III. Locating the Work: Hunting with Aggressiveness, Plus Caution

International contractors are hunters of opportunities and risks. Traditional contractors—those guided not merely by financial motives, but also by their passion for exciting construction work—enjoy the inherent appeal of calculated risk and limited danger. This makes the process of hunting for profitable opportunities simultaneously easy and difficult: easy, because there are many attractive projects on the world map, and difficult, because a bad project can destroy a company.

How, therefore, do companies identify opportunities that are both lucrative and challenging, without exposing themselves to excessive risk? Some of the major international construction firms have established satellite offices in several countries in order to find and develop new opportunities. These offices may begin with a relatively small staff, such as a single representative who may be an employee or a consultant working on behalf of the company to search for projects. Over time, and dependent on their results, such satellite offices can become branches or divisions of the construction firm.

Another option is to hire a consulting firm or adviser to “scout” for foreign clients, thereby allowing the international construction firm to avoid the substantial effort, coordination, expense, and investment of human resources involved in establishing separate entities or branches in other countries. Hiring local experts in the construction industry can be very useful, as they can promptly identify existing and future project opportunities through their personal contacts or through institutional avenues (such as private or government releases or official gazettes and/or newspapers that provide information about new projects).

For companies that prefer not to incur the expense or risk associated with opening a satellite office or to hire foreign consultants, there are other tools for obtaining foreign business. In this regard, the Internet can be a great resource for contractors seeking to do work abroad. Information provided on the Internet is an immediate source of potential business, and e-mail allows for communication at unprecedented speeds, enabling companies to obtain in minutes information that formerly would have required days, months, or even years to retrieve. For example, in the case of government contracts, many government entities have websites and electronic communication systems where they publish their plans, projects, and future bid opportunities. This permits companies to identify potential business opportunities quickly and without incurring any major expenses.

Another way to identify new projects is to monitor the international press and specialized media systems, which, on a free or paid subscription basis, provide access to new or existing opportunities. These services often provide early notification of new opportunities.

Finally, firms looking to perform work abroad are well served to maintain a broad network of trustworthy contacts (such as consultants or other com-

panies) to stay informed of potential opportunities outside the United States. These contacts can be through other international construction companies, local construction companies, or advisers, each option having its unique benefits and drawbacks.

In addition to being valuable sources of information, such contacts also may provide access to opportunities that otherwise would be inaccessible, including, perhaps, instances where the project owner or foreign government requires the involvement of a local contractor or an international contractor that has previously done business in the jurisdiction. For example, Qatar prohibits foreign companies from carrying out private business activity within the country unless those foreign companies partner with a Qatari firm.

In such cases, the contractor looking to do work in a particular jurisdiction is well served if it already has trusted contacts there with which to team up, either as members of a consortium or as joint venture partners in the execution of the project. Of course, before developing this sort of relationship with either another international construction firm or a local contractor, it is important to ascertain whether the potential partner is suitable. In addition to reviewing and evaluating the proposed partner's experience on previous projects performed in other parts of the world and any previous or existing differences or disputes involving that company, the construction firm should confirm that the potential joint venture partner or consortium member is well established, possesses the desired expertise and a substantiated record of successful performance, and has a solid reputation as an ethical firm.

A final word of caution: Firms must be very careful about the manner in which they locate and close deals abroad. There are several international regulations, including the Foreign Corrupt Practices Act (FCPA) and the OECD rules, as well as many local laws, that severely punish any person who is involved, whether directly or indirectly, in corruption. Forbidden activities include hiring "representatives" that are actually agents of corruption. Companies that run afoul of these rules can face large fines, debarment, or even criminal penalties.

IV. Working in a Foreign Country: What Is the Dress for Success?

While going global may set many construction firms on the road to greater success, many other companies enter into new markets with great expectations, but suffer devastating results due to their failure to adequately assess the risks. Notwithstanding that success or failure can occur on any project (whether domestic or abroad), failure to thoroughly assess and evaluate the circumstances and risks of a foreign project only increases the likelihood of failure. That is why, when considering whether to undertake a project in a foreign jurisdiction, it is particularly important to take into account all relevant considerations, as will be discussed in greater detail in the subsequent chapters of this book.

Some of the considerations that should be taken into account, in no particular order, are:

- **Local legislation and administrative rules that may apply to the project or to foreign companies performing work in the jurisdiction.** For example, in China, there is an abundance of legal and administrative rules regulating the presence and activities of foreign companies. There also are relatively frequent changes in the law, in policies, and in administrative requirements; these changes can generate inconsistencies and conflicts between the legal and administrative requirements, as well as between the national and local requirements. These issues must be considered carefully before performing work in China.
- **Legal and political stability of the foreign jurisdiction.** It is essential to identify whether there are critical political issues or an unstable political environment (such as currently exists in Venezuela, Ecuador, and Bolivia).
- **Applicable tax laws and labor laws and their impact on corporate operations.** In Venezuela, for example, the labor laws make it extremely difficult to terminate or lay off employees, which can adversely impact labor productivity. Brazil is considered to have very complex tax and labor laws. The Brazilian tributary system is a real challenge to investors and businesses in general, as is the Brazilian labor court system.
- **Availability and flexibility of controls on currency exchange rates, capital flowing out, banking regulations, and financial regulations.** In Ukraine, for example, foreign currency operations are regulated by the 1993 Decree of the Cabinet of Ministers, and certain foreign currency transactions may only be undertaken if an individual license is obtained from the National Bank of Ukraine.
- **Personal Safety.** For example, while Nigeria is widely known to offer opportunities for very significant projects, travel warnings issued by the U.S. Department of State indicate that personal safety is a major concern for all business visitors to Nigeria.

In addition to these general considerations, a construction firm looking to perform work outside the United States should also evaluate business considerations, such as the necessity and/or adequacy of a foreign office, the adequacy of the structure and personnel of the company to support an international project, and the financial health and discipline of the company.

From a legal standpoint, it is prudent to evaluate the legal system and rule of law in the foreign jurisdiction, the legal habits and customs in the marketplace, the applicable administrative rules, and governmental burdens. For example, it is important to evaluate the legal and ethical system of the local judiciary before crafting a dispute resolution clause that requires or allows for dispute resolution before that judiciary. Likewise, it is prudent to investigate

the existence and acceptance of international mediation, arbitration, and dispute resolution rules, as well as the local courts' execution of (and acceptance of challenges to) arbitration awards.

V. Private Contracts and Government Contracts: A Very Significant Difference

When entering a new market, the construction firm should consider whether it is interested in work involving private contracts and/or public contracts (i.e., contracts with governmental or quasi-governmental entities, whether federal, state, or local). While some of the most significant and potentially lucrative projects in emerging countries are public projects, in other places, private contracts for larger, sophisticated projects are more numerous as a result of the privatization of utilities and public services. The difference between private and public projects can be very significant in certain markets. The distinctions between the "private law" and the "public law," as well as the consequences of those distinctions, are fundamental.

For example, in many civil law countries, while a private contract is construed solely according to the rules of the applicable civil or commercial codes, a public contract is absolutely determined by the rules of government contract law (such as rules regarding administrative unilateral termination for convenience and unilateral termination for breach).

Another difference between private contracts and public contracts is that, in private projects, the client and the contractor have no obligation to adhere to formalities beyond those that their corporate rules establish, other than complying with local laws and regulations. On the other hand, public projects often require formalities such as official presentation of the project, informational meetings with officers, and publication of the invitation to bid in the official gazette or newspapers, among others.

Moreover, the considerations that must be taken into account before undertaking a public versus a private project abroad can be significant, even when selecting a lawyer to assist with the transaction. If the government contract law is complex and significantly different from that governing private contracts, an administrative lawyer can be of great assistance; in the case of private contracts, a commercial lawyer with a specialization in construction should suffice. Further, when a public project is particularly significant or complex, a very strict due diligence of the existing legal, economic, political, and social conditions is essential in order to avoid unpleasant surprises.

Notably, in recent years, a relatively new contracting scheme has emerged, referred to as a "public-private partnership," or "PPP," scheme. A PPP scheme is a hybrid between a private contract and a public contract. PPP schemes are often used in infrastructure development projects and are intended to promote effectiveness and efficiency between the public sector and the private sector. The London Underground is a good example of the utility of a PPP

scheme. Many countries have started to modify their legal regimes in order to promote the use of PPP schemes to develop and construct their most important infrastructure projects.

VI. Cultural Considerations: We Are All the Same, but Different in Many Ways

One of the most important issues for a construction firm to consider before undertaking work or contracting with an entity in a foreign jurisdiction is the cultural aspect of the transaction. The founding partner of a European international construction company once said: "When entering into a country to do business, do not act like conquerors, act like locals." Today, this is a cliché applicable to many aspects of commercial marketing; eighty years ago, however, this phrase was wisdom.

Understanding and being sensitive to local traditions is essential. In many countries, not trying to develop a personal relationship with the representatives of the client is considered rudeness, while in others, being "personal" is considered to border on corruption. For example, it is quite common in Mexico to discuss business matters and even close deals during long lunch hours, and this is not considered corruption. It is a way to strengthen personal relationships that are essential in the Mexican market. In some countries, being precise with documents, letters, and the contract is considered aggressiveness, while in other countries, a lack of precision is considered stupidity. It is, therefore, essential to explore not only the legal, political, and economic environment, but also the social and cultural environment as well.

VII. International Construction: A Challenge for Many Actors

Involvement in an international construction project is not easy. These projects require significant economic, financial, and operational capacity, as well as investigation, research, and objective evaluation of the foreign market.

International construction firms, or construction firms doing business outside their home country, face challenges almost every day, including political issues, legal modifications, economic crises, and financial shocks. All of these challenges can affect both the construction firm and the progress of the projects it is handling. The challenge, therefore, is indeed great and exciting, but a balanced perspective of reality must be maintained to achieve success on international construction projects. And in any case, the evaluation of the legal environment is essential to effectively assess the markets, which is the purpose of this book.